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L. G. Bingham; Attorney for Defendant and Respondent;

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IN THE SUPREME COURT

UNIVERSITY UTAH

of the

AUG 6 1959

STATE OF UTAH

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FILED

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CAROLYN SMITH,

Plaintiff and Appellant,

Clerk, Supreme Court, Utah

vs.

CLYDE G. SMITH,

Defendant and Respondent.

Case

No. 9015

RESPONDENT'S BRIEF

L. G. BINGHAM
Attorney for Defendant
and Respondent

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The court did not err as a matter of law in awarding the defendant husband the care, custody and control of the parties' minor children and at the same time allowing plaintiff to keep the physical control of the minor children upon condition that the children live with the mother of the plaintiff, and that said award does take into consideration the best interests of the children and is not in effect an award of custody to the grandmother	2
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IN THE SUPREME COURT
OF THE
STATE OF UTAH

CAROLYN SMITH,
Plaintiff and Appellant,

vs.

CLYDE G. SMITH,
Defendant and Respondent.

Case
No. 9015

BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

Respondent accepts Appellant's statements of the questions presented in the appeal.

STATEMENT OF FACTS

Respondent accepts the statement of facts outlined by Appellant with the following comments thereon. The parties had acquired an interest in a new home and while their financial situation was not of the best, was typical for a young couple acquiring a family and a home. It is true that little comment or evidence was offered relative to the mental cruelty charge by the plaintiff wife. The sole

contention being that the defendant husband was of a rather retiring nature and did not talk things over to the extent the plaintiff wife felt that he should.

STATEMENT OF POINTS

POINT I.

THE COURT DID NOT ERR AS A MATTER OF LAW IN AWARDING THE DEFENDANT HUSBAND THE CARE, CUSTODY AND CONTROL OF THE PARTIES' MINOR CHILDREN AND AT THE SAME TIME ALLOWING PLAINTIFF TO KEEP THE PHYSICAL CONTROL OF THE MINOR CHILDREN UPON THE CONDITION THAT THE CHILDREN LIVE WITH THE MOTHER OF THE PLAINTIFF, AND THAT SAID AWARD DOES TAKE INTO CONSIDERATION THE BEST INTERESTS OF THE CHILDREN AND IS NOT IN EFFECT AN AWARD OF CUSTODY TO THE GRANDMOTHER.

POINT II.

THAT THE COURT DID NOT ERR AS A MATTER OF LAW IN GRANTING A SPLIT CUSTODY ARRANGEMENT WHEREBY THE DEFENDANT HUSBAND WAS GRANTED CUSTODY DURING THE MONTHS OF JUNE, JULY AND AUGUST OF EACH YEAR.

POINT III.

THAT THE COURT DID NOT ERR IN PROCEEDING TO JUDGMENT WITHOUT MAKING SPECIFIC FINDINGS ON ALL OF THE ISSUES INVOLVED.

ARGUMENT

POINT I.

THE COURT DID NOT ERR AS A MATTER OF LAW IN AWARDING THE DEFENDANT HUSBAND THE CARE, CUSTODY AND CONTROL OF THE PARTIES' MINOR CHILDREN AND AT THE SAME TIME ALLOWING PLAINTIFF TO KEEP THE PHYSICAL CONTROL OF THE MINOR CHILDREN UPON CONDITION THAT THE CHILDREN LIVE WITH THE MOTHER OF THE PLAINTIFF, AND THAT SAID AWARD DOES TAKE INTO CONSIDERATION THE BEST INTERESTS OF THE CHILDREN AND IS NOT IN EFFECT AN AWARD OF CUSTODY TO THE GRANDMOTHER.

While the point raised by the Appellant appears to be as to the propriety of the court in arranging the custody of the parties minor children as stated in Appellant's brief, the main portion of Appellant's argument under this point is as to whether the conduct of Appellant wife was such that the best interests of the children would be served by removing them from her influence.

It is contended that the evidence in this matter does not sustain and could not sustain a finding that Appellant wife was unfit for custody of the minor children. Ap-

pellant's brief further states at page 8 "the most that can be found with regard to the mother's actions was that she was *indiscreet* in *transferring* her affections from her husband to another man." (my emphasis).

The evidence shows that the wife entertained a man in the parties' home on numerous occasions. That this man came and went in a manner indicative of residing at the home. Can it be described as a mere indiscretion for a wife to entertain a man in her home in a state of nudity where her children are sleeping? Is it mere indiscretion to cavort with this man in the living room of said home in such a manner as to create a spectacle for the amusement of the neighborhood? If the evidence in this record shows the wife to be guilty of a mere indiscretion it is submitted the phrase must be synonymous with "brazen licentiousness". The evidence clearly shows the "indiscretion" to be of the type, and conducted in a manner that evidenced to the trial court a person with little concern for the rules of society and less understanding of the moral values to be shown and taught to children. The "transfer of affection" that Appellant speaks of in her brief was in fact a public transfer conducted openly in the parties home with various neighbors as attesting witnesses thereto. To describe this conduct as a "transfer of affection from her husband to another man" is an attempt to dignify and make more palatable the flagrant deception of this husband and the desecration of his home.

The record clearly discloses ample evidence from which the trial court could conclude that the best interests of the children would not be served by their remaining in the sole custody of the plaintiff.

Appellant cites *Holm vs. Holm* 139 Pac. 937 as a case which is similar to the one at bar. It differs in several respects, however. The court found for the wife and granted to her the divorce. In addition the court did not find that the charge of adultery had been proven.

In *Stuber vs. Stuber*, 244 P2d. 650 the court stated the well known rule that the opinion of the trial court should be given great weight in evaluating the evidence since the trial judge saw and heard the witnesses and was in a better position to evaluate the evidence presented. There is no showing in the present case that the plaintiff intended to marry the man she was interested in as was the situation in the *Stuber* case.

POINT II.

THAT THE COURT DID NOT ERR AS A MATTER OF LAW IN GRANTING A SPLIT CUSTODY ARRANGEMENT WHEREBY THE DEFENDANT HUSBAND WAS GRANTED CUSTODY DURING THE MONTHS OF JUNE, JULY AND AUGUST OF EACH YEAR.

The point above stated and the argument of counsel relative thereto seems aimed at the trial court not making a finding that it would be for the best interests of the minor children for them to enjoy the society of their father. While it is contended that such an arrangement would not be beneficial to the children there is not allegation why. The trial court heard the parties and saw the witnesses. Not one iota of evidence was adduced that in any manner indicated that the defendant would not and

could not properly provide for and care for the children during the summer months. The argument of counsel on this point is a generalization of the problem of split custody. There is no showing, nor allegation, that in this specific instance it would not be in the interest of the children to reside with their father in the manner ordered by the court.

POINT III.

THAT THE COURT DID NOT ERR IN PROCEEDING TO JUDGMENT WITHOUT MAKING SPECIFIC FINDINGS ON ALL ISSUES INVOLVED.

The trial court found that the plaintiff wife had been guilty of gross misconduct in entertaining another man and in allowing this misconduct to become common knowledge to the community in which the parties lived. This finding clearly supports the court's award of the custody of the children. The fact that the court awarded the children to the defendant, or at least the "legal" custody, is in and of itself a finding as to where the best interests of the children are to be found.

CONCLUSION

The record clearly shows adequate evidence from which the trial court could and should make an award of physical custody of the parties minor children to the defendant. The record further discloses ample evidence that would indicate the plaintiff is unfit to have the care, custody and control of said minor children.

Respectfully submitted,

L. G. BINGHAM

Attorney for Defendant and Respondent